(2)

No. 90-320

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

ALLAN R. PERVIS,

*Petitioner,*

v.

STATE FARM FIRE AND CASUALTY COMPANY,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

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September 14, 1990

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## RESPONDENT'S BRIEF IN OPPOSITION

On or about July 19, 1985, a fire occurred at Petitioner's residence which destroyed the dwelling and its contents. Shortly thereafter, Petitioner filed a claim for insurance proceeds pursuant to a homeowner's policy of insurance issued to Petitioner by Respondent State Farm Fire and Casualty Company. Due to the suspicious nature of the fire, an investigation into the fire loss was conducted by Richard Wallace, a State Farm special investigator. State Farm also retained the services of three independent experts to determine the cause and origin of the fire. After a thorough investigation, Mr. Wallace and the three independent experts concluded that the fire was incendiary in origin. Complying with the mandates of Georgia law, State

Farm reported these findings to the State Fire Marshal and agreed to cooperate with law enforcement officials who were conducting their own independent criminal investigation into the fire.

During the course of its investigation, State Farm took recorded statements from Petitioner on July 22, 1985 and again on August 7, 1985. Neither was a sworn statement.

On August 28, 1985, State Farm demanded an examination under oath from Petitioner to take place on September 11, 1985, pursuant to a provision of the policy which provides that in case of a loss to which the insurance may apply, the insured shall submit to examinations under oath and subscribe to same.

On August 29, 1985, a grand jury in Lumpkin County issued an indictment against Petitioner, charging him with arson. Petitioner subsequently refused to submit to any examination under oath, asserting his Fifth Amendment privilege against self-incrimination. On September 4, 1985, State Farm again insisted on its right under the policy to take Petitioner's examination under oath and warned Petitioner's attorney that a failure to comply would be construed as a breach of the policy, thereby voiding coverage. Despite this warning, Petitioner again refused to submit to an examination under oath and, in fact, did not appear on September 11, 1985, at the time and place designated to conduct the scheduled examination.

A trial was scheduled in Lumpkin County on the criminal charges then pending against Petitioner for the first week in March, 1986. Both Mr. Wallace and one of the independent experts were subpoenaed as witnesses for the

State. On March 7, 1986, Petitioner was convicted of first degree arson for which he was sentenced to 40 years in prison and fined $10,000.

On July 17, 1986, while Petitioner was incarcerated, he filed this civil suit seeking $370,000 under the terms of the policy from State Farm plus punitive damages, interest, and attorney's fees. During the four months between his conviction and the filing of his civil suit, Petitioner never offered to submit to an examination under oath.

In a decision reached on January 8, 1987, the Court of Appeals of Georgia reversed the criminal conviction because the trial judge had failed to order the prosecution to provide Petitioner and his attorney a pre-trial opportunity to inspect, examine and test the physical evidence of arson removed from the site. *Pervis v. State*, 181 Ga. App. 613, 353 S.E.2d 200 (1987).

On May 5, 1989, State Farm's Motion for Summary Judgment was granted by the Honorable Marvin Shoob, United States District Judge for the Northern District of Georgia, Atlanta Division. The Court held that the Fifth Amendment privilege against self-incrimination did not excuse Petitioner's refusal to submit to an examination under oath. On May 18, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court. *Pervis v. State Farm Fire and Casualty Co.*, No. 89-8401, slip op. 2679 (11th Cir. May 18, 1990).

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF EVERY OTHER JURISDICTION THAT HAS ADDRESSED THE ISSUE PRESENTED IN THIS CASE.

The Eleventh Circuit correctly ruled that the Fifth Amendment privilege against self-incrimination does not excuse an insured's refusal to submit to an examination under oath. In so holding, the Eleventh Circuit has followed the lead of every other jurisdiction that has addressed the question. *See, e.g., Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969), *aff'g*, 290 F.Supp. 141 (W.D. Wis. 1968). To hold otherwise would set a dangerous precedent. Any individual under a potential threat of criminal charges could pursue an insurance claim and expect the company to pay, yet refuse to provide information vital to the company's investigation into the circumstances surrounding the loss.

In *Kisting*, 290 F.Supp. at 141, the court was faced with circumstances very similar to those presently before this Court. There, the insured refused to answer questions during his examination under oath regarding recent tax returns by invoking the privilege against self-incrimination. The court held that recovery was barred because the plaintiff sought "to utilize the privilege not only as a shield but as a sword." 290 F.Supp. at 149. Likewise, Petitioner cannot hide behind the Fifth Amendment privilege by refusing to submit to an examination under oath while at the same time prosecuting his own claim against State Farm.

Petitioner claims that the decision of the Eleventh Circuit is in conflict with the decisions of this Court, specifi-

cally *Lefkowitz v. Turley*, 414 U.S. 70 (1973) and *United States v. Wade*, 388 U.S. 218 (1967). However, both *Lefkowitz* and *Wade* concluded that the Fifth Amendment protects a person from being compelled by the State to testify against himself and, therefore, these decisions do not apply to a contract dispute between a private individual and a private corporation.

Although Petitioner concedes that State Farm is not an instrumentality of the State, he continues to insist that State Farm was behind his criminal conviction and that he should therefore be excused from the examination under oath requirement. These allegations have no basis in fact and are not supported by law. After a thorough investigation, the State Farm investigator and the three independent experts retained by State Farm reached the conclusion that the fire was incendiary in origin. As required by Georgia law, they reported their findings to the State Fire Marshal and cooperated with law enforcement officials who were conducting their own investigation into the fire. O.C.G.A. § 25-2-33(b). Anything less than full cooperation with the criminal authorities would have been a violation of both the letter and spirit of the law, and State Farm's cooperation with the State does not give Petitioner the right to ignore his duty under the insurance contract to submit to an examination under oath.

Petitioner relies heavily upon dicta in *United States v. White*, 589 F.2d 1283 (5th Cir. 1979), to support his contention that invocation of the Fifth Amendment privilege has resulted in the automatic entry of summary judgment in favor of State Farm and an unconstitutional forfeiture of his rights under the insurance contract. However, the *White*

dicta lends no support whatsoever to Petitioner's position because the facts of that case are dramatically different than those presently before this Court. That case concerned the issue of whether it is unconstitutional to force a criminal defendant to choose between preserving his Fifth Amendment privilege against self-incrimination and losing a civil lawsuit in which he was also a defendant. Since the defendant elected to forego silence at the civil trial, the *White* court focused its inquiry on the issue of whether his "waiver" of the Fifth Amendment privilege was voluntary, noting that there are always conflicting concerns and consequences to be weighed in choosing between silence and explanation. Even though the defendant might have been denied his most effective criminal defense, his choice to waive the privilege was deemed voluntary.

The most important difference between this case and *White* is that Petitioner chose to institute the civil suit against State Farm. Unlike the involuntary civil defendant in *White*, Petitioner's dilemma is entirely self-created. Noting the distinction between an involuntary defendant and a plaintiff in a civil suit, the Georgia Supreme Court in *Savannah Surety Associates, Inc. v. Master*, 240 Ga. 438, 439, 241 S.E.2d 192, 193 (1978) stated:

> What may happen when a plaintiff in a civil case asserts the privilege against self-incrimination therefore would not be the same as when a defendant asserts that same privilege.

Petitioner's complaint in this case is that he has had to suffer the consequences of invoking the privilege in the civil case, an argument that must be viewed with skepticism when it is noted that he took the stand and testified fully at

his criminal trial. Petitioner's motives are further highlighted by the fact that Petitioner never offered to submit to an examination under oath at any time during the four months between his testimony at the criminal trial and the filing of his civil action against State Farm. Under these circumstances, the Eleventh Circuit properly found that the entry of summary judgment against him "[did] not subject him to a deprivation of constitutional magnitude."

The conclusion of the Eleventh Circuit is in accord with prior decisions of this Court where it was noted in *Newton v. Rumery*, 480 U.S. 386, 394 (1987) that "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." Although Petitioner had an absolute right to invoke his Fifth Amendment privilege, that privilege did not release him from suffering the consequences that arose from his choice of silence instead of explanation. To be sure, a decision to abandon his insurance claim may have been difficult for Petitioner, but that fact alone does not mandate a review by this Court.

## II. A FLAT REFUSAL TO MAKE ANY APPEARANCE WHATSOEVER GOES FAR BEYOND ANY PROTECTION THAT MIGHT ARGUABLY BE AFFORDED BY THE FIFTH AMENDMENT.

Even if the Fifth Amendment did create a sufficient excuse for noncompliance with the examination under oath procedure during the pendency of criminal charges against the insured, Petitioner is not in a position to assert the privilege. In *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951), this Court enunciated the standard for measuring when a witness may properly claim his right against self-incrimination:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

A proper application of this standard implicitly requires that specific questions be propounded by the investigating body, and the claim of the right against self-incrimination must be claimed in response to each. As pointed out by the court in *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974), *cert. denied*, 419 U.S. 826 (1974), "[a] 'blanket' refusal to answer all questions is unacceptable." In this case, Petitioner could not demonstrate to the court below, nor can he demonstrate to this Court one single question that was asked by State Farm pursuant to the examination under oath requirement that triggered any claimed privilege under the Fifth

Amendment. Instead, Petitioner wants this Court to rule that the privilege excuses an insured from cooperating with the insurance company's investigation any time there is an on-going criminal investigation of the insured, a position that would totally emasculate the purpose of the examination under oath requirement. Such a result would fly in the face of the numerous court decisions recognizing the extreme importance of an examination under oath to the insurance company and, ultimately, to its shareholders and other policyholders. *See, Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81 (1884); *Halcome v. Cincinnati Ins Co.*, 254 Ga. 742, 334 S.E.2d 155 (1985).

Petitioner asserts that his Fifth Amendment and due process rights excuse his failure to submit to an examination under oath until after the conclusion of the criminal proceedings. However, his reliance upon *United States v. Wade*, 388 U.S. at 218, to support that proposition is misplaced. The issue in *Wade* was whether the Fifth Amendment privilege against self-incrimination was violated by compelling a criminal defendant to submit to a line-up. Answering this question in the negative, the Court noted that the privilege only protects an accused from being compelled to testify against himself. *Id.* at 221. However, since an accused's right not to give testimony against himself was not at issue, this Court did not specifically state that the privilege could only be asserted in response to questions actually propounded. To conclude otherwise, however, would contradict this Court's decision in *Hoffman v. United States*, 341 U.S. at 486-87. Therefore, Petitioner's interpretation of *Wade* must fail.

The proposition which Petitioner urges this Court to accept is further undermined by *Hudson Tire Mart, Inc. v.*

*Aetna Cas. & Sur. Co.*, 518 F.2d 671 (2nd Cir. 1975), in which the Second Circuit Court of Appeals was faced with a factual situation similar to the present case. In that case, a May, 1974 fire resulted in a September, 1974 indictment of the owner of the business. The indictment was followed a month later by a notice of examination under oath mailed by the insurance company. The indicted owner refused to appear for his examination under oath, and he moved the court for protection from his appearance, claiming a violation of his due process rights. The court found no violation of due process since the insured had refused to appear for any examination whatsoever. The court noted that, "there are numerous relevant matters with respect to which an insured may be examined without necessarily incriminating himself." *Id.* at 674.

Thus, missing from this case is the essential condition precedent to Petitioner's assertion of his Fifth Amendment privilege against self-incrimination — i.e., allegations or facts demonstrating that he refused to answer specific questions propounded by State Farm for fear of incriminating himself. Rather, the facts of record clearly indicate that Petitioner simply asserted the unacceptable "blanket" refusal to testify. Under these circumstances, no question is presented which warrants the grant of certiorari.

## III. AN INSURER'S RIGHT TO INSIST UPON COMPLIANCE WITH THE EXAMINATION UNDER OATH REQUIREMENT PRESENTS NO ISSUE FOR REVIEW BY THIS COURT.

Because Petitioner provided two prior statements to State Farm investigators, he contends that the examination under oath was not "reasonably required" under the policy. In the first place, such a factual argument does not rise to a level of importance that merits this Court's attention. Secondly, acceptance of Petitioner's argument would totally emasculate the purpose the examination under oath was designed to serve since any individual could arbitrarily decide that he had provided enough information to enable the insurance company to make a decision on his claim. The examination under oath procedure affords the insurance company the opportunity to thoroughly question the insured and the insured's agents about the details of the loss, and the insurance company is not required to admit or deny liability for the loss until that critical part of the investigation has been concluded. The importance to the insurance company of the examination under oath cannot be overestimated, and the courts have always given great deference to the right of the insurance company to broadly examine its insured before liability may be imposed. *Claflin v. Commonwealth Ins. Co.*, 110 U.S. at 81.

The Georgia Supreme Court recently addressed the importance to an insurance company of conducting a thorough examination under oath as part of its investigation. In *Halcome v. Cincinnati Ins. Co.*, 254 Ga. at 742, the Georgia Supreme Court, in answering a certified question from the Eleventh Circuit Court of Appeals, faced the issue of

whether an insured's refusal to provide information regarding his income during examination under oath breached the insurance contract, thereby barring recovery. In finding a breach of the insured's duty of cooperation, the court stated, "if the Halcomes fail to provide any material information called for under . . . the policy, they breach the insurance contract." *Id.* at 744.

Applying the rationale of the *Halcome* court to the present set of facts, it becomes clear that Petitioner would have breached his contract with State Farm if he failed to provide one item of material information during an examination under oath. The breach involved here is much greater, however, since Petitioner completely refused to answer *any* questions under oath. The policy provides that no action shall be brought unless there has been compliance with all the policy provisions, including the requirement that the claimant submit to examinations under oath and subscribe to same. No matter how much unsworn information Petitioner conveyed to State Farm's investigators, the policy entitled State Farm to insist upon an examination under oath and Petitioner refused to comply. Therefore, Petitioner did not satisfy his obligations under the policy and his case was properly dismissed.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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